

Devin T. Green,)	
)	Case No. 03-0181-CV-W-FJG
vs.)	Crim No. 99-0126-01-CR-W-FJG
United States of America,)	
Respondent.)	

February 28, 2003, and the Court rejected his request for relief on March 4, 2004. As a result, the pending motion must be reviewed as his second or successive § 2255 motion.

A prisoner cannot bring a second, or collateral, § 2255 motion unless it contains a claim involving

(1) newly discovered evidence that, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that no reasonable factfinder would have found the movant guilty of the offense; or

(2) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable. See 28 U.S.C. § 2255.

The pending motion is silent on newly discovered evidence. Instead, movant argues that the recent Booker ruling should be retroactively applied to his sentence.

For a new rule to be retroactive to cases on collateral review for purposes of a § 2255 petition, the Supreme Court itself must make the rule retroactive. Tyler v. Cain, 533 U.S. 656, 662-63 (2001). “When the Supreme Court makes a rule retroactive for collateral-review purposes, it does so unequivocally, in the form of a holding.” In re Anderson, 396 F.3d 1336 (11th Cir. 2005). In this regard, the Court agrees with the 11th Circuit that “[r]egardless of whether Booker established a ‘new rule of constitutional law’ . . . the Supreme Court has not expressly declared Booker to be retroactive to cases on collateral review.” Id. “Put simply, Booker itself was decided in the context of a direct appeal, and the Supreme Court has not since applied it to a case on collateral review.” Id. Accordingly, because movant fails to make a *prima facie* showing of either of the grounds for collateral review under § 2255, his petition for relief must be dismissed.

For all the reasons stated above, it is hereby

ORDERED that movant's application for relief from judgement pursuant to Fed.

R. Civ. P. 60(b)(4), (5) and (6). is denied.

/s/Fernando J. Gaitan, Jr.
United States District Judge

Dated: May 16, 2005
Kansas City, Missouri